SIN KEAN BOON METAL INDUSTRIES SDN. BHD.

v.

TRIKKON CONSTRUCTION SDN. BHD.

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMED JC
[CIVIL SUIT NO. 23-131-88]
9 DECEMBER 1991

CIVIL PROCEDURE: *Plaintiffs obtain Judgment and execute a garnishee order in their favour - The defendant succeeds in his appeal against the order of the SAR - Matter further appealed to the Supreme Court - Still pending. Issue - Whether moneys withheld should remain in custody of the solicitor or payed into the Court or returned to the defendant - Garnishee order not set aside yet Rules of the High Court 1980 O. 29 r. 2(1).*

The original claim of the plaintiff for a sum of RM281,139.18 with interests and costs from the defendants, was allowed by the learned SAR on 20 July 1989. The defendants appealed against the said order and the High Court allowed it. The plaintiffs than appealed to the Supreme Court which is currently pending.

Upon obtaining the said judgment given by the learned SAR, the plaintiffs garnished a sum of RM218,113.80. That money is now with the solicitors of the plaintiff.

On 15 June 1991 the High Court allowed the defendant's appeal against the order of the SAR.

By a SIC filed on 26 August 1991 the plaintiffs sought an order for:

(i) the defendant to pay into the Court a sum of RM281,139.81 being the fund in dispute and in the alternative,

(ii) the sum of RM281,139.81 be deposited into OCBC Bank in the joint name of the respective solicitors and that the same should remain in custody of the said bank pending the trial of the action or further order.

The defendants on 31 July 1991 *vide* SIC prayed for the return of the said moneys together with interests and also for the disputed garnishee order to be set aside.

Held:

[1] Suffice for me to say, even if the allegations are true (which the Court doubts) the fact that the defendants could not satisfy the judgment alone is not sufficient for this Court to deprive the defendants of the moneys it was entitled to. Defendants should not be subject to execution before judgment.

[2] Just as the plaintiffs were entitled to garnish the money on the strength of the judgment given by the SAR though an appeal to the Judge was pending, now that the judgment had been reversed it follows that the plaintiff are not entitled to hold on to it anymore.

[Application dismissed with costs.]

[**Ed. Note:** The plaintiffs have appealed to the Supreme Court *vide* S.C.C.A. No. 2-557-91 on 13 December 1991.]

Cases referred to:

*Sebaya Sdn. Bhd . v. Syarikat Bekerjasama Ladang Kelapa Sawit Pegawai-Pegawai Negeri Pahang Bhd. [1980] 2 MLJ 23 (**dist**)*

*Third Chandris Shipping Corporation v. Unimarine SA [1979] 1 QB 645 (**dist**)*

Legislation referred to:
Rules of the High Court 1980, O. 29, r. 2, r. 2(1)

Other sources referred to:
Mallal's Supreme Court Practice, Vol. 1, 369
The Supreme Court Practice 1988, Vol. 1, p. 483, para. 29/2-32

For the plaintiff - Gerard Chan (with Gerard Samuel); M/s. Lim Kean Siew & Co.
For the defendant - Mahinder Singh (with Ismadi Zainal Abidin); M/s. Mahinder Singh Dulku & Co.

JUDGMENT

Abdul Hamid Mohamed JC:

The plaintiffs claimed against the defendants for payment RM281,139.18 for works done and completed with interests and costs. On 20 July 1989, the Senior Assistant Registrar gave judgment for the plaintiffs. The defendants appealed. The appeal was allowed by me and the plaintiffs appealed to the Supreme Court. The last mentioned appeal is now pending. After obtaining the judgment given by the Senior Assistant Registrar, the plaintiffs garnished a sum of RM218,113.80 (according to the figure given by the plaintiffs - encl. 57, para. 4). That money is now with the plaintiffs' solicitors on an interest bearing account with the Overseas Chinese Banking Corporation Ltd. Beach Street Penang.

On 15 June 1991 I allowed the defendants' appeal against the judgment given by the Senior Assistant Registrar.

On 26 August 1991 the plaintiffs filed a summons-in-chambers praying for the following orders:

> 1. that the defendant do pay into Court to the credit of this action the sum of RM281,139.81, being the fund in dispute in this action or to otherwise secure this sum to the satisfaction of the Court until the trial of this action or further order;
>
> 2. alternatively, that the sum of RM281,139.81 be deposited into Overseas Chinese Banking Corporation Ltd., at their main branch at Beach Street, Penang, in the joint names of the respective solicitors for the plaintiff and for the defendant, and the same should remain in the custody of the said bank until the trial of this action or further order;
>
> 3. that the costs occasioned by this action be costs in the cause.

On 31 July 1991 the defendants filed a summons-in-chambers praying, *inter alia*, for the return of the money together with interests and also for the garnishee order to be set aside.

Both learned Counsel agreed that the plaintiffs' application be heard first. I heard and dismissed the plaintiffs' application with costs. These are my grounds.

Learned Counsel for the plaintiffs conceded that as a general principle, when a judgment in favour was reversed, the money garnished should be returned to the defendants as the basis for the garnishee order had ceased to exist. However, he argued that there were exceptions and this case fell within those exceptions.

First, learned Counsel for the plaintiffs relied on O. 29 r. 2(1) of the Rules of the High Court 1980 which reads:

> 2(1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

I accept that money is "property". However, I am of the view that that rule is not applicable as the money in question is not "the subject matter of the cause or matter, or as to which any question may arise therein." The money in question is money garnished in satisfaction of the judgment.

Support for this view is to be found in *Mallal's Supreme Court Practice* Vol. 1 at p. 369:

> The rule, however, applies only to property or things being the subject-matter of the action or as to which any question may arise in such actions. See *Vetati v. Braham* 46 L.J.C.P.N.S. 425; *Ridpath v. Zachner* 9 TLR 538.

The Supreme Court Practice 1988, Vol. 1 at p. 483 para. 29/2-32 says:

> The property must be *bona fide* the subject-matter of the action (*Scott v. Mercantile Accident Insurance Co.* [1892] 8 TLR 320.

Learned Counsel for the plaintiffs also relied on the Federal Court decision in *Sebaya Sdn. Bhd. v. Syarikat Bekerjasama Ladang Kelapa Sawit Pegawai-Pegawai Negeri Pahang Bhd.* [1980] 2 MLJ 23.

In that case, the respondents a co-operative society, which owned an oil-palm plantation had appointed the appellants as manager but had not got a cent from it. The respondents served a notice of dismissal and took action against the appellants. They obtained an interlocutory order for the appellants to pay into Court the proceeds of the sale of oil palm fruits harvested from the land. The Federal Court confirmed the said order.

Even though the judgment did not refer to any written law or rules (indeed it could not refer to O. 29 of the Rules of the High Court 1980, which had not yet come into force at the time of the decision), it is clear from the facts that the amount ordered to be paid into Court would have fallen squarely under O. 29 r. 2. It is clear that the proceeds of sale of oil palm fruits in that case were the subject-matter of the cause or matter or, at least, as to which any question might arise therein.

That case, in my view, is not applicable to the facts of this case.

Learned Counsel for the plaintiffs also relied on "Mareva injunction" as the source of power of the Court to make the order applied for.

He cited specifically the case of *Third Chandris Shipping Corporation v. Unimarine SA* [1979] 1 QB 645 CA. It should be noted that in that case it was held, *inter alia*:

> that the High Court had jurisdiction ... to grant a Mareva injunction as an interlocutory order in appropriate cases where it appeared that a debt, which was or was likely to be the subject of proceedings in England, **was owing and there was a real risk of the debtor removing assets from within the jurisdiction so as to defeat** the debt.

This is not such a case. There is no evidence whatsoever that the defendants were removing assets from within the jurisdiction. Without dealing with the principles upon which Mareva injunction is granted, I say that the principles have no application in this case and do not assist the plaintiffs. Indeed, the plaintiffs are not asking for a Mareva Injunction.

A number of affidavits were filed by the plaintiffs and learned Counsel went at length in trying to show that the defendants were not making "substantial profits" as claimed by them, that the defendants had insufficient assets (which were not subject to charges) and were not in a position to satisfy the judgment, if the plaintiffs were to succeed eventually. Indeed, learned Counsel argued that the plaintiffs had to garnish the money because the defendants could not, then, satisfy the judgment debt.

I do not think it is necessary for me to go into details and make a finding of fact whether or not the allegations made by the plaintiffs regarding the financial position of the defendants are true or not. Suffice for me to say, that even if the allegations are true (which I doubt), that fact alone is not sufficient for this Court to deprive the defendants of the moneys it was entitled to. Defendants should not be subject to execution before judgment.

As the matter now stands, the basis for the garnishment had ceased to exist because the judgment had been reversed, though appeal to the Supreme Court is pending. Just as the plaintiffs were entitled to garnish the money on the strength of the judgment given by the Senior Assistant Registrar though an appeal to the Judge was pending, now that that judgment had been reversed, it follows that the plaintiffs are not entitled to hold on to it any more.

For these reasons I dismissed the application with costs.

Also found at [1992] 1 CLJ 713